



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Barton ATC, Inc.

File: B-271877; B-271878

Date: August 6, 1996

Travis L. Pierson for the protester.

Col. Nicholas P. Retson, and Maj. Michael J. O'Farrell, Jr., Department of the Army, for the agency.

Sylvia Schatz, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency determination that proposals were technically unacceptable is denied where the agency reasonably determined that the proposals failed to indicate an acceptance of, and a clear, unambiguous and unconditional commitment to perform in accordance with, the solicitation provisions regarding (1) the necessity for contracting officer approval before the contractor can be compensated for furnishing additional meteorological services outside the normal hours of operation specified in the solicitations and (2) the required personnel qualifications.

DECISION

Barton ATC, Inc. protests the proposed award of contracts to Weather Data Services, Inc. under requests for proposals (RFP) Nos. DAHA90-95-R-0049 and DAHA90-95-R-0048, issued by the National Guard Bureau (NGB) for meteorological services for Selfridge Air National Guard Base in Selfridge, Michigan (RFP -0049) and Buckley Air National Guard Base in Denver, Colorado (RFP -0048). Barton, the incumbent for both contracts, primarily challenges NGB's determination that its technical proposals under both solicitations were unacceptable.

We deny the protests.

The solicitations provided for the contractor to furnish meteorological services such as weather watch, surface weather observations, aircrew weather briefings, meteorological watch, weather warnings and advisories, and terminal forecasting from facilities at the bases. The evaluation schemes in both RFPs were identical; both contemplated the award of a fixed-price contract for a base year and 4 option years to the offeror whose proposal best satisfies the government's requirements based on consideration of two factors, technical and price, with technical being significantly more important than price.

NGB found Barton's technical proposals to contain numerous statements that were either ambiguous or conflicted with the terms of the RFPs. Although NGB considered Barton's proposals unacceptable, it included them in the competitive range for discussion purposes. During the ensuing discussions, the agency advised Barton in writing of the areas in its proposals that were ambiguous or in conflict with specific paragraphs in the solicitations. The agency then requested best and final offers (BAFO). NGB found that although Barton's subsequent BAFOs addressed some of the agency's concerns, the proposals failed to resolve a number of the identified concerns and as a result remained technically unacceptable. Upon learning of the resulting elimination of its proposals from the competitive range in both procurements, Barton filed these protests with our Office. (NGB has informed our Office that it intends to make award to Weather Data Services, Inc. under both RFPs.)

Barton challenges NGB's determination that its BAFOs were technically unacceptable, arguing that its BAFOs did not contain any statements that were ambiguous or in conflict with RFP requirements.

The procuring agency has the primary responsibility for evaluating the technical information supplied by an offeror and determining the technical acceptability of the offeror's proposal; we will not disturb a determination with respect to technical acceptability unless it is shown to be unreasonable. See Intelligent Env'ts, B-256170.2, Nov. 28, 1994, 94-2 CPD ¶ 210. A protester's mere disagreement with the agency's technical judgment does not establish that it was unreasonable. See Diversified Technical Consultants, Ltd., B-250986, Feb. 22, 1993, 93-1 CPD ¶ 161.

We find that the agency reasonably determined that Barton's BAFOs were technically unacceptable on the basis that they failed to indicate a clear, unambiguous acceptance of, and commitment to perform in accordance with, the solicitation requirements.

For example, the solicitations provided for the possibility that the contractor might receive requests for weather support outside the normal hours of operation specified in the solicitations, and requested unit prices for furnishing estimated numbers of such contingency hours. The statements of work (SOW) cited as examples of emergencies or special events requiring such contingency support such situations as exercises, surge requirements, disasters, accident and rescue operations, deployments, nighttime flying, and severe weather. The SOWs provided that requests for emergency or special event support must be approved in advance, whenever possible, by the contracting officer, but that "[i]f advance approval is not practical, the contractor is still required to respond within 1 hour of notification and provide the appropriate support services." (At the same time, however, the contractor apparently was expected to exercise some discretion in determining "the appropriate support services," since the SOWs added with respect to "No Notice

Requests" that the contractor's base weather station supervisor "will use [his] best judgment in providing any necessary support services.") In the event that "coordination with the contracting officer is not practicable," the SOWs required the contractor's base weather station supervisor to submit not later than the next regular work day "Request for Contingency Support" and "Certification of Contingency Hours Worked" forms to contracting officials. According to the SOWs, the contracting officer then "will either approve or disapprove" the request, and the contractor "shall invoice for approved emergency or special event support services on a monthly basis."

Thus, the solicitations clearly reserved to the contracting officer the right to "either approve or disapprove" the contractor's request for after-the-fact approval of "no notice" contingency hours, thereby imposing on the contractor the risk that it would not be paid for hours worked which the contracting officer believed, in the reasonable exercise of his discretion, were not appropriate. However, while Barton in its initial proposals responded with a "Noted" to these provisions, it added that "[w]e assume . . . that if approval/disapproval is not received by the [weather] station, the requested support is to be provided . . . and that the contractor will be compensated for the support provided." In response to the agency's notice during discussions that these sections of its proposals conflicted with the provisions of the solicitation, Barton responded in its BAFOs by asserting that "[w]e see no conflict" (RFP -0049) and "[n]o conflict is intended" (RFP -0048). Barton stated that:

"[instances] are expected to arise, as they have in the past, in which support may be requested on Saturday, for support early on Monday. In such case, it will be impossible to obtain approval from the contracting officer prior to providing the service. We merely indicate that we expect, in such cases, that we must provide the requested support and that we will be compensated for the additional services." (Emphasis added.)

While Barton maintains that its use of the word "noted" in its initial proposal signified its acceptance of the solicitation requirements, we believe that its continued assertion of an expectation of payment for any "no notice" hours worked even after being advised of the agency's view that this conflicted with the provisions of the SOWs reasonably led the agency to conclude that Barton was conditioning its agreement to the terms of the solicitations on a right to payment for any and all such hours. Again, this conflicted with the solicitation provisions that clearly reserved to the contracting officer the right to disapprove the contractor's request for after-the-fact approval of "no notice" contingency hours on the basis that they were not appropriate.

Likewise, we believe that the agency reasonably concluded that Barton's BAFOs also did not indicate a clear, unambiguous commitment to perform in accordance with the solicitation requirements regarding personnel qualifications. The SOWs specified a number of labor categories--such as contract manager, weather supervisor, forecaster, and weather observer--and established minimum experience, training and/or physical condition requirements for each category. In addition, the SOWs required submission of resumes for all weather supervisors, forecasters, and weather observers; generally reserved to the contracting officer the right to review and approve all resumes prior to the contractor's final commitment of the employees for assignment; and specifically required contracting officer approval before an intended forecaster hire can receive the required certification or an intended observer hire can be scheduled for or take the required government-administered qualification test.

In its initial proposals, Barton advised the government that "[i]n the event of serious personnel loss or . . . greatly increased requirements, it may become necessary to temporarily detail personnel from another location in order to meet the needs of the moment." Barton requested that in such a case the agency waive "certification requirements" on a one-time basis, adding that it anticipated that any personnel temporarily detailed to the location would be "from a similar station" and would be "fully qualified on the equipment and duty requirements." Elsewhere in its proposals, however, Barton stated that "personnel might be detailed from corporate headquarters or from other facilities to lend necessary temporary support."

While NGB believed that personnel detailed from "similar" weather stations might be acceptable, it was concerned that Barton elsewhere in its proposals was proposing detailing personnel "from corporate headquarters or from other facilities"; it noted that the resumes for Barton's corporate headquarters personnel indicated that only one individual had any weather observer training, with no indication of proficiency in the use of the weather equipment at the agency facilities, and it questioned whether personnel from "other facilities," such as air traffic control personnel, would be qualified to perform weather observing and forecasting duties. In response to the agency's notice during discussions that it viewed these two sections of Barton's proposals to be in conflict, Barton denied in its BAFOs that any conflict existed, asserting that its proposals "merely state that we will utilize all available personnel, in the most efficient and expeditious manner possible, to prevent any disruption of service which may result from some contingency."

The agency, however, concluded that Barton's response did not resolve its concern that Barton's proposed approach could result in unqualified personnel being detailed to perform weather services at the base weather stations. Although Barton argues that these provisions of its proposals did not qualify its commitment to comply with the personnel qualifications in the SOWs, we find that Barton's proposal to detail personnel from corporate headquarters or from other unspecified facilities (and not

merely from similar weather stations), when considered in conjunction with Barton's request for the waiver of "certification requirements" in such event and its failure to offer any assurances as to the qualifications of personnel detailed from corporate headquarters or from other unspecified facilities, reasonably led the agency to question Barton's commitment to staffing the contracts at all times with personnel meeting the SOWs' personnel qualifications requirements.

Given NGB's reasonable determination that Barton's proposals failed to indicate an acceptance of, and a clear, unambiguous and unconditional commitment to perform in accordance with, the solicitation provisions regarding the necessity for contracting officer approval before the contractor can be compensated for furnishing additional meteorological services outside the normal hours of operation specified in the solicitations and the required personnel qualifications, we conclude that the agency reasonably determined that Barton's BAFOs were unacceptable.¹

The protests are denied.

Comptroller General
of the United States

¹Although Barton argues that the agency did not hold meaningful discussions with the firm, because it failed to specifically identify the matters raised as "deficiencies," there was no requirement that the agency do so; rather, by reasonably leading Barton into the areas of its proposals that, unless corrected, would prevent an offeror from having a reasonable chance for award, the agency satisfied the requirement that the discussions be meaningful. See SeaSpace Corp., B-252476.2, June 14, 1993, 93-1 CPD ¶ 462.